

1 JACOB M. HEATH (STATE BAR NO. 238959)
jheath@orrick.com
2 ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
3 Menlo Park, CA 94025-1015
Telephone: +1 650 614 7400
4 Facsimile: +1 650 614 7401

Attorneys for Defendant
Meta Platforms, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 DR. ANDREW FORREST,
12 Plaintiff,
13 v.
14 META PLATFORMS, INC.
15 Defendant.

Case No. 22-cv-03699-PCP

**DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S THIRD AMENDED
COMPLAINT WITH PREJUDICE AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: March 28, 2024
Time: 10:00 a.m.
Courtroom: Courtroom 8
Judge: Hon. Casey P. Pitts

1
TABLE OF CONTENTS

	Page
I. INTRODUCTION	2
II. FACTUAL BACKGROUND	3
A. Plaintiff Claims He Discovered the Scam Ads in 2014.....	3
B. Plaintiff Sues Meta in the California Court Based on Its Purported Decision to Not Remove Cryptocurrency Scam Ads.....	4
C. Plaintiff Commences Private Criminal Prosecution in Australia.	4
D. The California Court Sustains Meta's Demurrer and Plaintiff Files His SAC.....	5
E. The Court Implements a Stay, Lifts the Stay in Part, and Plaintiff Files His TAC.....	5
III. LEGAL STANDARD.....	6
IV. ARGUMENT	6
A. Section 230 of the Communications Decency Act Bars Plaintiff's Claims.....	6
1. Section 230 applies in this case.	7
2. Meta is an interactive computer service provider.	8
3. The content at issue was provided by another information content provider, not Meta.....	9
4. Each of Plaintiff's claims seek to treat Meta as a "publisher."	13
B. Plaintiff's Claims Are Time Barred.....	15
1. Misappropriation of name and likeness.	15
2. Unjust enrichment.....	16
C. Plaintiff Fails to State Any Viable Claim For Relief.....	16
1. Misappropriation of name and likeness.	16
2. Negligence and negligent failure to warn.	18
3. Unjust enrichment.....	20
4. Declaratory Relief.....	21
D. Plaintiff Should Not Be Granted Leave to Amend.	22
V. CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Achal v. Gate Gourmet, Inc.</i> , 114 F.Supp.3d 781 (N.D. Cal. July 14, 2015)	22
<i>Al-Ahmed v. Twitter, Inc.</i> , 648 F. Supp. 3d 1140 (N.D. Cal. 2023)	16
<i>Al-Ahmed v. Twitter, Inc.</i> , No. 21-CV-8017, 2022 WL 1605673 (N.D. Cal. May 20, 2022)	15
<i>Arenas v. Shed Media U.S. Inc.</i> , 881 F. Supp. 2d 1181 (C.D. Cal.)	17
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	6
<i>Astiana v. Hain Celestial Grp., Inc.</i> , 783 F.3d 753 (9th Cir. 2015)	20
<i>Barnes v. Yahoo!, Inc.</i> , 570 F.3d 1096 (9th Cir. 2009)	7, 13
<i>Beckman v. Match.com, LLC</i> , 743 F. App'x 142 (9th Cir. 2018)	19
<i>Bel Air Rd., LLC v. Zillow Grp., Inc.</i> , 2020 WL 774354 (C.D. Cal. Feb 18, 2020).....	12
<i>Bibicheff v. PayPal, Inc.</i> , 844 F. App'x 394 (2d Cir. 2021)	19
<i>Brittain v. Twitter, Inc.</i> , No. 19-CV-114, 2019 WL 2423375 (N.D. Cal. June 10, 2019)	22
<i>Brown v. Wells Fargo Bank, N.A.</i> , No. 19-CV-260, 2019 WL 3318551 (E.D. Cal. July 24, 2019)	21
<i>Calise v. Meta Platforms, Inc.</i> , 2022 WL 1240860 (N.D. Cal. April 27, 2022).....	8, 10
<i>Christoff v. Nestle USA, Inc.</i> , 47 Cal.4th 468 (2009)	15
<i>Cross v. Facebook, Inc.</i> , 14 Cal. App. 5th 190 (2017)	7, 15, 17, 18

1	<i>Cusano v. Klein</i> , 264 F.3d 936 (9th Cir. 2001)	15
2		
3	<i>Delgado v. Trax Bar & Grill</i> , 36 Cal. 4th 224 (2005)	19, 20
4		
5	<i>Doe II v. MySpace Inc.</i> , 175 Cal.App.4th 561 (2009)	14
6		
7	<i>Doe No. 1 v. Uber Technologies, Inc.</i> , No. 310131, 2022 WL 1769112 (N.D. Cal. June 1, 2022)	19
8		
9	<i>Downing v. Abercrombie & Fitch</i> , 265 F.3d 994 (9th Cir. 2001)	17
10		
11	<i>Dyroff v. Ultimate Software Grp., Inc.</i> , 934 F.3d 1093 (9th Cir. 2019)	<i>passim</i>
12		
13	<i>Ebeid v. Facebook, Inc.</i> , No. 18-cv-07030, 2019 WL 2059662 (N.D. Cal. May 9, 2019).....	8
14		
15	<i>In re Facebook, Inc.</i> , 625 S.W.3d at 94.....	14
16		
17	<i>Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC</i> , 521 F.3d 1157 (9th Cir. 2008)	11
18		
19	<i>Federal Deposit Ins. Corp. v. Dintino</i> , 167 Cal.App.4th 333 (Cal. Ct. App. 2008)	16
20		
21	<i>Fields v. Twitter, Inc.</i> , 217 F. Supp. 3d 1116 (N.D. Cal. 2016)	15
22		
23	<i>Force v. Facebook, Inc.</i> , 304 F. Supp. 3d 315 (E.D.N.Y. 2018)	7
24		
25	<i>Force v. Facebook, Inc.</i> , 934 F.3d 53 (2d Cir. 2019).....	11, 13
26		
27	<i>Forrest v. Facebook</i> , Case No. 21-CIV-05055 (Sept. 17, 2021).....	4
28		
	<i>Fyk v. Facebook, Inc.</i> , 808 F. App'x 597 (9th Cir. 2020)	12
	<i>Goddard v. Google, Inc.</i> , 640 F. Supp. 2d 1193 (N.D. Cal. 2009)	11, 12, 13
	<i>Gonzalez v. Google LLC</i> , 2 F.4th 871 (9th Cir. 2021)	7, 11

1	<i>Hicks v. Bradford,</i> 2023 WL 6190884 (C.D. Cal. Aug. 17, 2023).....	9
2		
3	<i>Jackson v. Airbnb, Inc.,</i> 654 F.Supp.3d 990 (C.D. Cal. 2023)	19
4		
5	<i>Joude v. WordPress Found.,</i> No. 14-CV-1656, 2014 WL 3107441 (N.D. Cal. July 3, 2014).....	15
6		
7	<i>Kimball v. Flagstar Bank F.S.B.,</i> 881 F. Supp. 2d 1209 (S.D. Cal. 2012).....	21
8		
9	<i>Kimzey v. Yelp! Inc.,</i> 836 F.3d 1263 (9th Cir. 2016)	9, 10
10		
11	<i>King v. Facebook, Inc.,</i> No. 21-CV-4573, 2021 WL 5279823 (N.D. Cal. Nov. 12, 2021)	22
12		
13	<i>Klayman v. Zuckerberg,</i> 753 F.3d 1354 (D.C. Cir. 2014)	19
14		
15	<i>Klayman v. Zuckerberg,</i> 910 F. Supp. 2d 314 (D.D.C. 2012)	10
16		
17	<i>Leadsinger, Inc. v. BMG Music Publ'g,</i> 512 F.3d 522 (9th Cir. 2008)	22
18		
19	<i>Lee v. City of Los Angeles,</i> 250 F.3d 668 (9th Cir. 2001)	6
20		
21	<i>Lloyd v. Facebook, Inc.,</i> 2022 WL 4913347 (N.D. Cal. Oct. 3, 2022).....	8, 22
22		
23	<i>Loomer v. Zuckerberg,</i> 2023 WL 6464133 (N.D. Cal. Sept. 30, 2023)	8
24		
25	<i>Lopez v. Smith,</i> 203 F.3d 1122 (9th Cir. 2000)	22
26		
27	<i>Marshall's Locksmith Serv. Inc. v. Google,</i> LLC, 925 F.3d 1263 (D.C. Cir. 2019)	11
28		
24	<i>Melton v. Boustred,</i> 183 Cal. App. 4th 521 (2010)	19
25		
26	<i>Mendiondo v. Centinela Hosp. Med. Ctr.,</i> 521 F.3d 1097 (9th Cir. 2008)	6
27		
28	<i>Miller v. Yokohama Tire Corp.,</i> 358 F.3d 616 (9th Cir. 2004)	22

1	<i>Morton v. Twitter, Inc.</i> , 2021 WL 1181753 (C.D. Cal. Feb. 19, 2011).....	8, 12
2		
3	<i>Newton v. Meta Platforms, Inc.</i> , 2023 WL 5749258 (N.D. Cal. Sept. 6, 2023)	8
4		
5	<i>Oja v. United States Army Corps of Engineers</i> , 440 F.3d 1122 (9th Cir. 2006)	15
6		
7	<i>Penrose Hill, Ltd. v. Mabray</i> , 479 F. Supp. 3d 840 (N.D. Cal. 2020)	16
8		
9	<i>Perfect 10, Inc. v. Google, Inc.</i> , No. CV 04-9484, 2010 WL 9479060 (C.D. Cal. July 30, 2010)	17, 18
10		
11	<i>Perfect 10, Inc. v. Visa Int'l Serv. Ass'n</i> , 494 F.3d 788 (9th Cir. 2007)	17
12		
13	<i>Peterson v. Cellco P'ship</i> , 164 Cal. App. 4th 1583 (2008)	20
14		
15	<i>Rigsby v. GoDaddy Inc.</i> , 2023 WL 1489914 (9th Cir. Feb. 3, 2023)	10
16		
17	<i>Ripple Labs Inc. v. YouTube LLC</i> , 2020 WL 6822891 (N.D. Cal. 2020)	14
18		
19	<i>Roadrunner Intermodal Servs., LLC v. T.G.S. Transp., Inc.</i> , 2021 WL 2188138 (E.D. May 28, Cal. 2021)	21
20		
21	<i>Starr v. Baca</i> , 652 F.3d 1202 (9th Cir. 2011)	6
22		
23	<i>Tarasoff v. Regents of Univ. of Cal.</i> , 17 Cal. 3d 425 (1976)	20
24		
25	<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001).....	7
26		
27	<i>Tuttle v. Chase Ins. Life & Annuity Co.</i> , 2007 WL 2790359 (N.D. Cal. Sept. 20, 2007)	18
28		
24	<i>United States v. Little Lake Misere Land Co.</i> , 412 U.S. 580 (1973).....	7
25		
26	<i>Ynfante v. Google LLC</i> , 2023 WL 3791652 (S.D.N.Y. June 1, 2023)	8, 11
27		
28	<i>Youngevity International, Corp. v. Smith</i> , 224 F.Supp.3d 1022 (N.D. Cal. 2016)	15

1	<i>In re Zoom Video Commc'ns Inc. Priv. Litig.</i> , 525 F. Supp. 3d 1017 (N.D. Cal. 2021)	19
2		
3	Statutes	
4	Cal. Civ. Code § 338(d)	16
5	Cal. Civ. Code § 339(1)	16
6	Cal. Civ. Code § 3425.3	15
7	California Civil Code § 3344	17
8	California's Unfair Competition Law	4
9	Communications Decency Act Section 230	<i>passim</i>
10	Lanham Act	5
11		
12	Other Authorities	
13	Fed. R. Civ. P. 12(b)(6)	2, 3, 5, 6
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on March 28 2024, at 10:00 AM, or as soon thereafter as may be heard by the Honorable Judge Casey Pitts, United States District Court, San Francisco Division, 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Meta Platforms, Inc. will and hereby does move to dismiss Plaintiff's Third Amended Complaint on the grounds that Plaintiffs fail to state a claim upon which relief can be granted and Plaintiff's claims are moreover barred by Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1).

This motion is based upon this notice of motion and motion, the memorandum of points and authorities in support thereof, the proposed order filed concurrently herewith, all pleadings and papers on file in this action, the arguments of counsel, and upon such further oral and written argument and evidence as may be presented at or prior to the hearing on this motion.

Dated: January 19, 2023

ORRICK, HERRINGTON & SUTCLIFFE
LLP

By: /s/ Jacob M. Heath
Jacob M. Heath

Attorney for Defendant
META PLATFORMS, INC.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant Meta Platforms, Inc. (“Meta”) respectfully submits this Memorandum of Law
 3 in Support of its Motion to Dismiss Dr. Andrew Forrest’s (“Plaintiff”) the Third Amended
 4 Complaint (“TAC”) Pursuant to Fed. R. Civ. P. 12(b)(6) (“Motion”).

5 **I. INTRODUCTION**

6 In September 2021, Plaintiff sued Meta in San Mateo County Superior Court asserting
 7 several claims arising from Meta’s purported role in the distribution of scam ads that purportedly
 8 used Plaintiff’s name and likeness to promote an investment scheme. Plaintiff admitted in that
 9 complaint that those scam ads were created by *third-party* fraudsters. The California State Court
 10 dismissed Plaintiff’s claims concluding, *inter alia*, that Section 230 of the Communications
 11 Decency Act (47 U.S.C. § 230 *et seq.*)—which prohibits liability based on a website’s
 12 publication, distribution (algorithm or otherwise), and removal of third-party content—barred
 13 Plaintiff’s claims. Nearly *three* years later, Plaintiff seeks to have his *fourth* bite at the proverbial
 14 apple, bringing a TAC that, once again, asserts nearly identical claims arising from the same
 15 alleged scam ads. Although Plaintiff has attempted to reframe his allegations to avoid Section
 16 230’s protection, none of the facts have changed. As established herein, none of his new
 17 allegations overcome the defects of his prior complaints.

18 *First*, Plaintiff’s assertion that Australian law should somehow apply to a lawsuit that
 19 Plaintiff filed in the United States, asserting California law claims, against a U.S.-based company
 20 is meritless. This is an obvious attempt to bypass Section 230 altogether, which must fail, as
 21 there is no legal basis for Plaintiff’s argument.

22 *Second*, because Section 230 applies here, it continues to bar Plaintiff’s claims, which
 23 seek to hold Meta liable as publisher of third-party content. Plaintiff’s erroneous efforts to frame
 24 Meta as the “producer” of ads on its website, simply because Meta purportedly offers a “suite of
 25 advertising tools and applications,” does not overcome Section 230’s preclusive effect. In fact,
 26 courts across the country have consistently recognized that the precise activity Plaintiff alleges
 27 Meta engaged in—including organizing, recommending, and amplifying third-party content—is
 28 *not* the same as creating it, particularly where there is no allegation that Meta materially

1 contributed to the purported unlawfulness of the scam ads at issue. Section 230, therefore,
 2 continues to bar Plaintiff's lawsuit in its entirety.

3 *Third*, Plaintiff's claims are barred by the applicable statute of limitations. Crucially,
 4 Plaintiff admits in his TAC that he has been aware of the alleged scam ads and Meta's purported
 5 involvement in the alleged distribution of those ads since 2014, well beyond any applicable
 6 statute of limitations here.

7 *Finally*, Plaintiff's lawsuit fails because the TAC does not allege facts sufficient to state
 8 any of his claims for (1) misappropriation-of-likeness, (2) negligence (3) negligent failure-to-
 9 warn; and (4) unjust enrichment. Accordingly, this Court should dismiss the TAC, with
 10 prejudice.¹

11 **II. FACTUAL BACKGROUND**

12 **A. Plaintiff Claims He Discovered the Scam Ads in 2014**

13 Defendant Meta operates Facebook, which helps give people the power to build
 14 community and bring the world closer together, and also enables advertisers to create ads, launch
 15 and manage advertising campaigns. Plaintiff, Dr. Andrew Forrest, purports to be a "prominent
 16 Australian businessman and philanthropist." TAC ¶ 31. At the crux of Plaintiff's case are
 17 allegations that "Scam Ads"—fake ads "using his name and likeness to endorse cryptocurrency
 18 and other fraudulent investment products"—are running on "the Facebook platform." TAC ¶ 54.
 19 Plaintiff claims that "[s]cammers operating on Meta's (then Facebook's) Australian social media
 20 platforms have been co-opting Dr. Forrest's name and image in order to swindle innocent
 21 Australians since 2014." TAC ¶ 44.

22 Plaintiff claims that he *first* learned of these scam ads in 2014 after he discovered that his
 23 "image was being used by a number of internet scammers who were setting up 'imposter' pages
 24 appearing to belong to Dr. Forrest." TAC ¶ 46. According to Plaintiff, upon discovering these
 25 ads in 2014, he "commenced an investigation to determine who was behind these fake pages."

26 ¹ The TAC also alleges a promissory estoppel claim, which Meta does not address in this
 27 Motion. Plaintiff has agreed to dismiss the claim voluntarily, *without prejudice*, subject to a
 tolling agreement between the parties tolling the statute of limitations for the claim for 12 months.
 The parties have also agreed that Plaintiff can amend his complaint to add the promissory
 estoppel in the future, and that Meta reserves its right to file a Rule 12 motion as to this claim.

1 *See id.* ¶ 47. Plaintiff claims that the investigation revealed that the scammers were outside of the
 2 U.S., purportedly used false identities, that were recreating the pages. *Id.* ¶ 48. Plaintiff further
 3 claims that he “repeatedly brought this to the attention of Meta and Meta’s legal department.” *Id.*
 4 Based on these allegations, Plaintiff claims that “as of at least 2014, Meta was aware that Dr.
 5 Forrest’s name and image were being misused to dupe Australian users of Meta’s social media
 6 platforms....” *See id.* ¶ 49.

7 Plaintiff claims that in or about “late March 2019,” he further learned that “fake ads using
 8 his name and likeness” were running on Facebook. *Id.* ¶ 54. Although Plaintiff claims these
 9 “Scam Ads were produced by Meta Ads, not by social media user postings,” he concedes that the
 10 people behind the “Scam Ads” are third-party fraudsters involved “with entities from various
 11 foreign countries, using sham entities, fake information, and false addresses.” TAC ¶ 60.
 12 Plaintiff claims that the impact of these ads “on Australian users has been far reaching.” TAC ¶
 13 62.

14 Since Plaintiff purportedly learned of the scam ads in March 2019, he says he has
 15 “mobilized an effort to identify and capture evidence of these Scam Ads.” TAC ¶ 69. Plaintiff
 16 claims that despite this lawsuit, “Scam Ads featuring Dr. Forrest’s misappropriated image are still
 17 being produced and disseminated by Meta Ads.” *Id.* ¶ 79.

18 **B. Plaintiff Sues Meta in the California Court Based on Its Purported Decision
 19 to Not Remove Cryptocurrency Scam Ads.**

20 In September 2021, Plaintiff filed his initial lawsuit in San Mateo County Superior Court.
 21 *Forrest v. Facebook*, Case No. 21-CIV-05055 (Sept. 17, 2021), San Mateo Superior Court (“State
 22 Ct. Dkt.”), Complaint, Dkt. No. 2. He amended his complaint in November 2021, asserting
 23 claims for common law misappropriation-of-likeness, aiding and abetting fraud, negligent failure-
 24 to-warn, and negligent design, as well as violations of California’s Unfair Competition Law. *See*
 25 generally State Ct. Dkt. No. 12 (“FAC”).

26 **C. Plaintiff Commences Private Criminal Prosecution in Australia.**

27 On or around January 31, 2022, Plaintiff commenced a “private prosecution” against Meta
 28 in the Magistrates Court of Western Australia, seeking to hold Meta criminally liable for the
 purported third-party cryptocurrency scam ads. *See* Dkt. No. 49.

1 **D. The California Court Sustains Meta’s Demurrer and Plaintiff Files His SAC.**

2 Meta demurred Plaintiff’s FAC, and in April 2022, the state court sustained Meta’s
 3 demurrer on multiple grounds. *See* Notice of Removal Ex. B, ECF No. 1-2 at 3 (hereinafter
 4 “Order”). The California Court recognized that all of Plaintiff’s claims were barred by Section
 5 230, which “immunizes Facebook from liability … arising from [Meta’s] role as a publisher.” *Id.*
 6 at 6. In so holding, the court rejected Plaintiff’s argument that Meta’s targeting of scam ads to
 7 susceptible users made Section 230 inapplicable; “[D]etermin[ing] where certain ads are seen and
 8 by whom,” the court observed, is a key, protected publisher function. *See id.* The California
 9 Court also held independent of Section 230 that Plaintiff failed to state a claim for negligent
 10 failure-to-warn (there is no duty to warn absent a “special relationship” between Meta and
 11 Plaintiff), along with other claims. *See id.* at 6-7.

12 In June 2022, Plaintiff filed his SAC, reasserting his original claims and new claims for
 13 alleged violations under the Lanham Act, declaratory relief, and for unjust enrichment. *See*
 14 *generally*, SAC. On June 23, 2022, Meta removed the case to the U.S. District Court for the
 15 Northern District of California. *See* Dkt. No. 1.

16 **E. The Court Implements a Stay, Lifts the Stay in Part, and Plaintiff Files His
 17 TAC.**

18 On March 29, 2023, the Court granted Meta’s Motion to Stay Litigation Pending
 19 Resolution of Plaintiff’s Criminal Proceeding, Dkt. 48, and stayed the action in its entirety. Dkt.
 20 79 at 5 (granting a stay until after the next disclosure/committal hearing in Plaintiff’s Australian
 21 Criminal proceedings because “[d]oing so will potentially provide more clarity on the status of
 22 the criminal proceedings and Dr. Forrest’s role in those proceedings”)². On October 27, 2023, the
 23 Court lifted the stay in part. Dkt. 95. The Court retained the stay of discovery and any obligation
 24 for Meta to file a responsive pleading but lifted the stay as to Meta’s Rule 12 motion practice. *Id.*
 25 at 2.³ With the stay partially lifted, on December 1, 2023, Dr. Forrest filed his TAC, reasserting

26 ² The Court extended the stay until November 3, 2023, and then again until November 20,
 27 2023. Dkt. 86.

28 ³ In this Order, the Court specifically communicated that Meta could seek guidance from
 the Court regarding “any potential prejudice concerns [Meta] believes would be presented by
 filing a Rule 12 motion responding to the amended complaint.” Dkt. 95 at 2.

some of his former claims and bringing a new claim for negligence.⁴ The TAC also adds additional supposed details about Meta’s advertising tools and once again attempts to reframes Meta’s involvement in the alleged scam ads—now referring to Meta as the “producer” of the scam ads, which he has never previously claimed. *See, e.g.*, TAC ¶¶152, 232. But, as before, Plaintiff concedes that third parties created the content at issue. *See, e.g.*, TAC ¶¶ 44, 60.

III. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Dismissal is appropriate “where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In conducting a Rule 12(b)(6) analysis, the court may consider the complaint, material relied upon in the complaint, and material subject to judicial notice. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001). The court must accept “well-pleaded factual allegations” as true, but need not “accept as true a legal conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 664, 678; *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (“[A]llegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.”).

IV. ARGUMENT

A. Section 230 of the Communications Decency Act Bars Plaintiff’s Claims.

Plaintiff devotes the majority of his TAC to various flawed arguments on why Section 230(c)(1) purportedly does not apply here. *See TAC ¶¶ 84-213*. His efforts fail.

Section 230(c)(1) provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Section 230(e)(3) gives teeth to this intent by stating unequivocally that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). Section 230 is

⁴ *See supra* regarding the dismissal of Plaintiff’s promissory estoppel claim.

1 to be “construed broadly, ‘to protect websites not merely from ultimate liability, but from having
 2 to fight costly and protracted legal battles.’” *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 206
 3 (2017). Crucially, Section 230 bars claims based on a service provider’s decisions about
 4 “reviewing, editing, and deciding whether to publish or to withdraw from publication third-party
 5 content.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009).

6 Under Section 230(c)(1), a claim should be dismissed if (1) the defendant is a “provider . .
 7 . of an interactive computer service[;]” (2) the content at issue was “provided by another
 8 information content provider[;]” and (3) the plaintiff’s claim treats the defendant as the “publisher
 9 or speaker” of that content. 47 U.S.C. § 230(c)(1). All three elements are present here.

10 **1. Section 230 applies in this case.**

11 As an initial matter, Dr. Forrest is incorrect by insisting that this Court should bypass
 12 Section 230 altogether because his claims arise out of activity in Australia. Indeed, Section 230 is
 13 a federal statute that applies “in American courts.” *Gonzalez v. Google LLC*, 2 F.4th 871, 888
 14 (9th Cir. 2021) (citation omitted), *vacated on other grounds*, 598 U.S. 617 (2023). As the Ninth
 15 Circuit has instructed, “Congress intended” Section 230 to apply to claims filed “in American
 16 courts,” regardless of “the place where the claims principally arose.” *Gonzalez*, 2 F.4th at 888
 17 (applying Section 230 even though “all relevant conduct [took] place outside the United States”).

18 Plaintiff rejects the application of Section 230 because he believes his claims arise out of
 19 “Australian locus and impact of fraud.” TAC ¶¶ 213. Section 230, however, contains no
 20 exception for so-called “foreign” claims, and “the absence of any carve-out for [such] claims . . .
 21 indicate[s] that no such exception was intended.” *Force v. Facebook, Inc.*, 304 F. Supp. 3d 315,
 22 324 (E.D.N.Y. 2018) (“[A] conflict-of-laws analysis [cannot] prevent[] the application of federal
 23 statutes to foreign-law-based claims.”); *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (“Where
 24 Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions
 25 are not to be implied.” (citation omitted)). Application of Australian law would be “plainly not in
 26 accord with the federal program implemented by [Section 230]” and, thus, would not be “a
 27 permissible choice here.” *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 604
 28 (1973). Thus, Section 230 applies here.

1 **2. Meta is an interactive computer service provider.**

2 Section 230 defines an interactive computer service provider as “any information service,
 3 system, or access software provider that provides or enables computer access by multiple users to
 4 a computer server.” 47 U.S.C. § 230(f)(2). “Websites are the most common interactive computer
 5 services.” *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019). And
 6 courts have uniformly held that Meta meets Section 230’s “interactive computer service provider”
 7 definition. *See, e.g., Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088 (N.D. Cal.
 8 2015), *aff’d*, 697 Fed. Appx. 526 (“it is undisputed that Facebook is an interactive computer
 9 service provider”); *Lloyd v. Facebook, Inc.*, 2022 WL 4913347, at *8 (N.D. Cal. Oct. 3, 2022)
 10 (“Meta and/or Facebook is an interactive computer service provider); *Loomer v. Zuckerberg*,
 11 2023 WL 6464133, at *12 (N.D. Cal. Sept. 30, 2023) (same); *Ebeid v. Facebook, Inc.*, No. 18-cv-
 12 07030, 2019 WL 2059662, at *3 (N.D. Cal. May 9, 2019) (same).

13 In an effort to avoid Section 230, Plaintiff argues “***Meta Ads*** is not an interactive
 14 computer service.” *See TAC ¶ 84* (emphasis added). Plaintiff’s argument fails for several
 15 reasons. *First*, Plaintiff fails to allege that “*Meta Ads*”—a name Plaintiff created himself—is an
 16 actual entity, much less an entity distinct from Meta Platforms, Inc. While Meta provides
 17 advertising services to its users, courts have held that the fact an entity allegedly “generates
 18 revenue as an advertising agency” does not change that the entity also “provides or enables
 19 computer access by multiple users to a computer service.” *Sikhs for Justice “SFJ”, Inc.*, 144 F.
 20 Supp. 3d at 1093 (finding Facebook is an interactive computer service provider). Indeed, courts
 21 have applied Section 230 to bar claims involving Meta’s and other interactive computer service
 22 provider’s advertising businesses. *See, e.g., Calise v. Meta Platforms, Inc.*, 2022 WL 1240860, at
 23 *2 (N.D. Cal. April 27, 2022) (applying Section 230 to claims alleging Meta solicits, encourages,
 24 and assists scam advertisers); *Newton v. Meta Platforms, Inc.*, 2023 WL 5749258, at *2 (N.D.
 25 Cal. Sept. 6, 2023) (applying Section 230 to allegations regarding Meta’s restrictions on
 26 advertisements); *Morton v. Twitter, Inc.*, 2021 WL 1181753, at *3 (C.D. Cal. Feb. 19, 2011)
 27 (rejecting argument that Twitter is not an interactive computer service provider because it
 28 “operates its own Content Delivery Network” through advertising); *Ynfante v. Google LLC*, 2023

WL 3791652, at *2 (S.D.N.Y. June 1, 2023) (dismissing claims under Section 230 involving alleged scam advertisements posted through “Google Ads”); *see also* Order (sustaining demurrer under Section 230). Accordingly, Meta is an interactive computer service provider.

3. The content at issue was provided by another information content provider, not Meta.

Section 230 protection applies to content “provided by another information content provider,” which is defined as someone who is “responsible, in whole or in part, for the creation or development of” the offending content. 47 U.S.C. § 230(c), (f)(3). The Ninth Circuit has narrowly interpreted “development” to provide “immunity for passive conduits” and preclude immunity for “co-developers” who do “not merely ... augment[] the content generally, but ... materially contribut[e] to [the content’s] alleged unlawfulness.” *Hicks v. Bradford*, 2023 WL 6190884, at *3 (C.D. Cal. Aug. 17, 2023) (citing *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008)).

Here, although Plaintiff alleges erroneously that the purported “Scam Ads” were produced by “Meta’s advertising business” or “Meta Ads,” Plaintiff concedes that the “material” at issue—*i.e.*, the scam ads themselves—were “*supplied by criminal scammers.*” TAC ¶ 4 (emphasis added). Indeed, Plaintiff repeatedly concedes that third parties—not *Meta*—created the offending content. *See, e.g.*, TAC ¶ 44 (“Scammers...have been co-opting Dr. Forrest’s name and image in order to swindle innocent Australians since 2014”); TAC ¶ 60 (“Dr. Forrest learned that the people behind the Scam Ads were involved with entities from various foreign countries); TAC ¶ 58 (noting the Scam Ads “generate[] targets for the criminal organization sponsoring the Scam Ads”); TAC ¶ 59 (noting third-party “criminals” are “behind the Scam Ads”). Thus, the ads were provided by “another information content provider” and qualify for Section 230 protection.

Plaintiff insists Meta was responsible for “producing” the offending ads, which he claims bars application of Section 230 here. *See* TAC ¶ 143. But the TAC does not sufficiently allege how Meta made a “material contribution” to the “creation or development” of the purportedly unlawful content, as is required in the Ninth Circuit. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016) (emphasis added). A “material contribution” does not refer to “merely ... augmenting the content generally, but to materially contributing to its alleged unlawfulness.”

1 *Calise*, 2022 WL 1240860, at *3 (emphasis added) (finding Section 230 barred plaintiff’s claims
 2 where Meta did not contribute to the *illegality* of the third-party content). The “material
 3 contribution” test thus “draw[s] the line at the ‘crucial distinction between, on the one hand,
 4 taking actions … that are necessary to display … actionable content and, on the other hand,
 5 responsibility for what makes the displayed content illegal or actionable.” *Id.* at 1269 n.4. Thus,
 6 to avoid Section 230, Meta must have functioned as the information content provider “for the
 7 portion of the statement or publication *at issue*”—*i.e.*, the alleged scam content involving Dr.
 8 Forrest. *Rigsby v. GoDaddy Inc.*, 2023 WL 1489914, at *5 (9th Cir. Feb. 3, 2023) (finding
 9 defendant did not materially contribute to the content of the gambling site) (emphasis added);
 10 *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314 (D.D.C. 2012) (finding that while the defendants
 11 “might well be information content providers as to some information on their website,” they were
 12 not information content providers as to the posts at issue). The TAC is devoid of any such
 13 allegation.

14 Plaintiff points to certain features of Meta’s advertising business that he incorrectly claims
 15 render it the developer of the ads it generally publishes. Plaintiff’s arguments fail for the
 16 following reasons:

17 First, the various ad development tools Plaintiff claims that Meta purportedly offers—
 18 such as tools that (1) allow advertisers to “select certain demographics” (TAC ¶ 113), (2)
 19 “optimize the ad creative for each person viewing the ads” (TAC ¶ 121), (3) make ads “more
 20 appealing when they are ultimately shown to individual viewers on Facebook” (TAC ¶ 123), and
 21 (4) help “improve ad performance” (TAC ¶¶ 125, 128)—do not render Meta a “co-developer” of
 22 the allegedly unlawful scam ads. As courts have already determined, these are merely “tools
 23 meant to facilitate the communication and content of others”—the very functionality that courts
 24 have consistently held protected by Section 230. *Dyroff*, 934 F.3d at 1098; *Kimzey* 836 F.3d at
 25 1270 (Yelp’s star rating system did “absolutely nothing to enhance the defamatory sting of the
 26 message”); *Calise*, 2022 WL 1240860, at *6 (rejecting plaintiff’s argument that Meta was the
 27 information content provider because it purportedly “actively solicits and encourages third-party
 28 advertisers it knows or should know are scammers” to advertise on Facebook).

Indeed, none of these website features “required” or “prompted” the alleged third-party “criminals” (TAC ¶ 165) “to post [the] unlawful content” in the first instance. *Gonzalez*, 2 F.4th at 896. The Ninth Circuit has repeatedly affirmed that a website does not lose protection simply because it “provides neutral tools that a user exploits” to create illegal content. *Dyroff*, 934 F.3d at 1099 (finding certain functions, including “recommendations and notifications—are tools meant to facilitate the communication and content of others. They are not content in and of themselves.”). Merely “making information more available” through tools that make the offending ads “more appealing” or improve their performance is an “essential part of traditional publishing; it does not amount to ‘developing’ that information within the meaning of Section 230.” *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019); see, e.g., *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1199 (N.D. Cal. 2009) (demanding some “alleg[ation] that Google effectively ‘requires’ advertisers to engage in illegal conduct” to preclude Section 230 immunity); *Ynfante*, 2023 WL 3791652, at *3 (explaining features “such as the official ‘Ad’ label are [] ‘neutral tools for navigating websites’ that ‘merely provide a framework that could be utilized [by others] for proper or improper purposes.’ In other words, Google did nothing to make the content of the advertisement itself more unlawful.”); *Herrick* 765 F. App’x at 591 (app did not create content by providing “tools and functionality available equally to bad actors and the app’s intended users”).

Plaintiff also alleges that Meta can determine what “completed, paid-for ads will look like, and who will see them,” which allegedly renders Meta the creator of the scam content itself. TAC ¶ 119 (emphasis added). That allegation, however, is irrelevant to the Section 230 analysis as here. “A website operator who edits user-created content . . . retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality.” *Roommates*, 521 F.3d at 1169 (emphasis added); *Marshall’s Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019) (service providers’ decision to present third-party data in map format “does not constitute the ‘creation’ or ‘development’ of information”). Here, the alleged placement, performance, and positioning of the offending ads are unrelated to their alleged fraudulent nature or the alleged misappropriation of Plaintiff’s likeness.

1 *Second*, the alleged deficiencies with Meta’s monitoring and removal of allegedly illegal
 2 content do not defeat the application of Section 230, as explained further. Plaintiff claims that
 3 Meta has failed to implement technology to “detect and screen out scam ads” and to “compl[y]
 4 with its own policies” in order to “discover[] and prevent[] the Scam Ads.” TAC ¶¶ 138-139,
 5 150; *see also* TAC ¶ 137 (“Meta could have chosen to design and manage its advertising business
 6 to prevent or minimize the kind of Scam Ads that gave rise to this litigation”). But the alleged
 7 underenforcement of Meta’s monitoring policies cannot give rise to liability here. A website is
 8 afforded Section 230 protection even if the publishing of unlawful content arises out of a “refusal
 9 to enforce [the website’s] policies,” as numerous courts have held. *Reddit*, 2021 WL 5860904, at
 10 *4; *see, e.g.*, *Bel Air Rd., LLC v. Zillow Grp., Inc.*, 2020 WL 774354, at *9 (C.D. Cal. Feb 18,
 11 2020) (Section 230 barred false light claim against Zillow for failing “prevent users from ...
 12 posting false content” on its website). Similarly, it is irrelevant whether Meta knew or knows
 13 about the alleged fraudulent ads. Section 230 applies when a website “provides third parties with
 14 neutral tools to create web content, even if the website knows that the third parties are using such
 15 tools to create illegal content.” *Goddard*, 640 F. Supp. 2d at 1196 (emphasis added) (while
 16 “[p]laintiff allege[d] that Google has a Content Policy designed to exclude advertisements by
 17 fraudulent MSPPs, but ... ‘intentionally refuse[d] to enforce its policies,’” the court held that these
 18 allegations were “insufficient to overcome the ‘robust’ protections of the CDA”).

19 *Finally*, the fact that Meta allegedly derives revenue from the offending ads does not turn
 20 Meta into an information content provider either. The “fact that a website elicits online content
 21 for profit is immaterial” to the Section 230 analysis. *Goddard*, 2008 WL 5245490, at *3 (holding
 22 that allegations “that a website elicits online content for profit [are] immaterial”); *Morton*, 2021
 23 WL 1181753, at *3 (same); *Fyk v. Facebook, Inc.*, 808 F. App’x 597, 598 (9th Cir. 2020)
 24 (“[M]onetary purposes do[] not somehow transform Facebook into a content developer.”); *Fed.
 25 Agency of News LLC*, 432 F.Supp.3d at 1119 (“insofar as Plaintiffs assert that Section 230 does
 26 not protect Facebook’s ‘data mining’ efforts because they ‘generate billions in revenue, there is no
 27 ‘for-profit exception to § 230’s broad grant of immunity.’”).

28 In short, Plaintiff has alleged no feature of Meta’s advertising business that “play[s] any

1 special role in the illegality of [the Scam Ads].” *Reddit*, 2021 WL 5860904, at *5. Indeed,
 2 Meta’s advertising tools certainly do not “effectively ‘require[]’ advertisers to engage in illegal
 3 conduct,” *Goddard*, 640 F. Supp. 2d at 1199, but rather provide neutral tools for all advertisers to
 4 use. *Dyroff*, 934 F.3d at 1099. As alleged, Meta has not materially contributed to the scam
 5 content at issue. Thus, Meta is not the creator or developer of the ads at issue, which means that
 6 Section 230’s second requirement is met.

7 **4. Each of Plaintiff’s claims seek to treat Meta as a “publisher.”**

8 Under Section 230, a plaintiff’s claim treats a defendant as a “publisher” when it seeks to
 9 hold a service provider liable for its purported exercise of “editorial functions”—such as
 10 “deciding whether to publish, withdraw, postpone, or alter content.” *Barnes*, 570 F.3d at 1102
 11 (9th Cir. 2009) (barring negligent undertaking claim under Section 230). What matters is not the
 12 “name of the cause of action,” but “whether the duty that the plaintiff alleges the defendant
 13 violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’ If it does,
 14 Section 230(c)(1) precludes liability.” *Id.* at 1101-02. The statutory phrase “treat as a publisher”
 15 is construed broadly in favor of immunity. *Force*, 934 F.3d at 65 (noting “capacious conception
 16 of what it means to treat a website operator as the publisher ... of information provided by a third
 17 party”).

18 Here, Plaintiff’s claims, regardless of their labels, challenge third-party content on
 19 Facebook and Meta’s alleged decisions about what content to publish—including the selection,
 20 arrangement, display, and promotion of that content (and, conversely, screening, withdrawing,
 21 and removing it). All of these activities are protected by Section 230. Indeed, as the San Mateo
 22 Superior Court rightly held in dismissing Plaintiff’s FAC, “each of [Plaintiff’s] claims is based on
 23 allegations that [Meta] committed acts in the role of publisher, which Section 230(c)(1)
 24 precludes.” Order, Ex. B at 6. And while Plaintiff now brings some additional claims, nothing in
 25 the TAC changes that conclusion. For example, Plaintiff’s misappropriation of likeness claim
 26 seeks to hold Meta liable for the dissemination of third-party ad content that allegedly misused
 27 Plaintiff’s “name and likeness.” TAC ¶ 216. Plaintiff’s negligence claim involves Meta’s
 28 purported failure to postpone, block, or withdraw user-provided content from Facebook. *Id.* ¶

1 234. And Plaintiff's negligent failure-to-warn claims asserts that Meta breached a duty to "warn
 2 about Scam Ads—which would have required Meta to monitor the content of those third-party
 3 ads. *Id.* ¶ 248. Finally, Plaintiff's unjust enrichment claim alleges that Meta "wrongly received
 4 ad revenue" by publishing the third-party ads, at the expense of Plaintiff's "reputation, name,
 5 likeness, and endorsement." *Id.* ¶¶ 255-6. This claim, too, seeks to hold Meta liable for
 6 publishing third-party content.

7 Moreover, Plaintiff cannot circumvent Section 230 by alleging that Meta (1) failed to
 8 implement features to detect and remove scam advertisements (TAC ¶ 138); or (2) did not
 9 enforce its policies that would have discovered and prevented the scam advertisements (TAC ¶
 10 150). These theories still treat Meta as publisher: They claim that Meta is liable because it does
 11 not postpone, block, or withdraw user-provided content from their services. Courts nationwide
 12 have consistently applied Section 230 to bar similar claims. For example, in *Ripple Labs Inc. v.*
 13 *YouTube LLC*, 2020 WL 6822891 (N.D. Cal. 2020), the plaintiff challenged alleged spoofing
 14 videos that impersonated the plaintiff and its CEO to sell fraudulent cryptocurrency. *Id.* at *1.
 15 The plaintiff "alerted YouTube about the scam" and "[a] Forbes article in November 2019
 16 reported the scam," but YouTube "did not take down the fraudulent channels for days, weeks, or
 17 months after notice," and in fact "[n]ew instances of the scam 'continued to appear, often
 18 amassing thousands of views and creating more victims by the day.'" *Id.* at *2. Nevertheless, the
 19 court held that "YouTube has immunity under § 230(c)." *Id.* at *7; *see also Herrick*, 765 F.App'x
 20 at 591 ("Herrick's failure to warn claim is inextricably linked to Grindr's alleged failure to edit,
 21 monitor, or remove the offensive content ... accordingly, it is barred by § 230."); *In re Facebook,*
 22 *Inc.*, 625 S.W.3d at 94 (allegations about Facebook's alleged "lack of safety features" seek to
 23 hold Facebook "liable for its failure to combat" offensive third-party content); *Doe II v. MySpace*
 24 *Inc.*, 175 Cal.App.4th 561, 573 (2009) ("That appellants characterize their complaint as one for
 25 failure to adopt reasonable safety measures does not avoid the immunity granted by section
 26 230."). Such claims impermissibly treat Meta as publisher of third-party content too.

27 Ultimately, each of Plaintiff's theories of liability remains "the classic kind of claim that
 28 [has been] found to be preempted by section 230," and California and federal courts have

“uniformly rejected” them. *Gentry*, 99 Cal. App. 4th at 835; *see, e.g.*, *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 208 (2017) (dismissing misappropriation-of-likeness claim under Section 230); *Joude v. WordPress Found.*, No. 14-CV-1656, 2014 WL 3107441, at *7 (N.D. Cal. July 3, 2014) (dismissing “[p]laintiff’s allegation of misappropriation of likeness” under Section 230 (emphasis added)); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1126 (N.D. Cal. 2016) (dismissing failure-to-warn claim because the “theory of liability is inherently tied to content” and would “effectively requir[e defendant] to police and restrict its provision of [user] accounts”); *Reddit*, 2021 WL 58860904, at *6 (it is “readily apparent” that Section 230 bars “a claim for unjust enrichment” premised on a “quintessential [publisher] function” like displaying a third-party ad); *Al-Ahmed v. Twitter, Inc.*, No. 21-CV-8017, 2022 WL 1605673, at *16 (N.D. Cal. May 20, 2022) (dismissing unjust enrichment claim).

Thus, because Plaintiff’s claims each attempt to treat Meta as the publisher or speaker of the content at issue, Section 230(c)(1)’s final requirement is met.

B. Plaintiff’s Claims Are Time Barred.

Several of Plaintiff’s claims are further barred by their respective statutes of limitations.

1. Misappropriation of name and likeness.

The statute of limitations for a claim for misappropriation of name and likeness in California is *two years*. *See Christoff v. Nestle USA, Inc.*, 47 Cal.4th 468, 474 (2009); *see also Cusano v. Klein*, 264 F.3d 936, 950 (9th Cir. 2001) (“The statute of limitations for infringement of the right of publicity in California is two years.”). The single publication rule, as codified in Cal. Civ. Code § 3425.3, applies to these claims, such that there is “but a single potential action” for an instance of misappropriation regardless of how many times it was republished. *Christoff*, 47 Cal.4th at 476-78 (noting that the statute of limitations period begins to run, upon “the first general distribution of the publication to the public”). “In the context of websites, republication does not occur so long as the statement is not substantively altered or directed to a new audience.” *Youngevity International, Corp. v. Smith*, 224 F.Supp.3d 1022, 1027 (N.D. Cal. 2016); *see also Oja v. United States Army Corps of Engineers*, 440 F.3d 1122, 1132 (9th Cir. 2006) (rejecting plaintiff’s argument that a defendant continuously republished information by hosting the

1 information on a website); *Penrose Hill, Ltd. v. Mabray*, 479 F. Supp. 3d 840, 850-52 (N.D. Cal.
 2 2020) (holding that internet post containing link to allegedly defamatory blog post published over
 3 18 months earlier was not republication of original blog post).

4 Here, Dr. Forrest's claim accrued in 2014 when it first came to Dr. Forrest's attention that
 5 his image was being used on Facebook. TAC ¶ 46 ("During 2014, it came to Dr. Forrest's
 6 attention that his image was being used by a number of internet scammers who were setting up
 7 'imposter' pages appearing to belong to Dr. Forrest."); *id.* ¶ 49 ("Thus, as of at least 2014, Meta
 8 was aware that Dr. Forrest's name and image were being misused..."). Because Dr. Forrest's
 9 misappropriation claim arises from these ads, *see id.* ¶ 215, this claim is barred by the two-year
 10 statute of limitations and must be dismissed with prejudice.

11 **2. Unjust enrichment.**

12 A claim for unjust enrichment is subject to either a ***two-year*** or ***three-year*** statute of
 13 limitations depending on the underlying wrong. *Al-Ahmed v. Twitter, Inc.*, 648 F. Supp. 3d 1140,
 14 1157 n.2 (N.D. Cal. 2023). If the claim is founded on a quasi-contract theory, the statute of
 15 limitations is two years under Cal. Civ. Code § 339(1). *Id.* If the claim is based on conversion,
 16 fraud, or mistake, the statute of limitations is three years under Cal. Civ. Code § 338(d). *Id.* An
 17 unjust enrichment claim is subject to the discovery rule and accrues when a plaintiff actually or
 18 reasonably should have discovered the actions resulting in unjust enrichment. *Federal Deposit
 19 Ins. Corp. v. Dintino*, 167 Cal.App.4th 333, 349 (Cal. Ct. App. 2008)

20 Regardless of which of these standards applies, Plaintiff's unjust enrichment claim is time
 21 barred. The basis for Plaintiff's unjust enrichment claim is that Meta was "unjustly enriched
 22 through the receipt of ad revenue derived in connection with" the alleged exploitation of
 23 Plaintiff's name and likeness. TAC ¶ 257. His claim accordingly accrued in 2014 when he first
 24 became aware that there were pages on Facebook using his image. *Id.* ¶¶ 44, 46. His unjust
 25 enrichment claim is therefore time-barred.

26 **C. Plaintiff Fails to State Any Viable Claim For Relief.**

27 **1. Misappropriation of name and likeness.**

28 Plaintiff asserts that Meta misappropriated his name and likeness because of alleged "co-

1 opting” of Plaintiff’s “name and image in order to swindle innocent Australians” and the setting
 2 up of “‘imposter’ pages” on Facebook. TAC ¶¶ 44, 46.

3 Under California law, such a claim may arise in both common law and California Civil
 4 Code § 3344. To allege a common law claim, Plaintiff must show “(1) the defendant's use of the
 5 plaintiff's identity; (2) the appropriation of [the] plaintiff's name or likeness to [the] defendant's
 6 advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.” *Arenas v.*
 7 *Shed Media U.S. Inc.*, 881 F. Supp. 2d 1181 (C.D. Cal.), *aff'd sub nom. Arenas v. Shed Media US,*
 8 *Inc.*, 462 F. App'x 709 (9th Cir. 2011) (citations omitted). For a claim under § 3344, a plaintiff
 9 must allege all the elements of a common law claim plus “a knowing use by the defendant” and
 10 “a direct connection between the alleged use and the commercial purpose.” *Downing v.*
 11 *Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001).

12 Here, Plaintiff’s misappropriation-of-likeness claim fails for two reasons. *First*, Plaintiff
 13 has not alleged facts showing that Meta, as opposed to third-party Facebook users, “used”
 14 Plaintiff’s name or likeness to support misappropriation liability. In *Cross v. Facebook, Inc.*, for
 15 instance, the court recognized that the “use” element was not met when “third parties,” and not
 16 Facebook, were the ones who actually “posted” the “unauthorized Facebook pages” that featured
 17 the plaintiff’s name and likeness. 14 Cal. App. 5th at 209. Facebook’s actions in hosting the
 18 content and “generating revenue” from the content within its broader platform, the court
 19 recognized, were not “use.” *Id.* Here, as in *Cross*, the misappropriating content was designed
 20 and uploaded by a third party, and Facebook merely distributed the content on the same terms that
 21 it distributes all advertising content. *See supra* Section IV.A.3. This is insufficient to establish
 22 Meta’s “use” of Plaintiff’s likeness.⁵

23 *Second*, Plaintiff’s allegations that Meta generally profits by keeping users engaged and

24 ⁵ Notably, California courts have even rejected claims like Forrest’s under secondary liability or
 25 aiding and abetting theories. *See Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484, 2010 WL
 26 9479060, at *13-14 (C.D. Cal. July 30, 2010), *aff'd*, 653 F.3d 976 (9th Cir. 2011) (concluding
 27 allegations that Google hosted advertisements for third-party websites that displayed models’
 28 names and likenesses did not mean that Google was “inappropriately *using* the models’
 likenesses” for purposes of a right-of-publicity claim); *accord Perfect 10, Inc. v. Visa Int'l Serv.*
Ass'n, 494 F.3d 788, 809 (9th Cir. 2007) (rejecting claim for aiding and abetting right of publicity
 violation as unsupported by California law). Transmission of misappropriating third-party
 content does not constitute “use.”

1 selling advertisements, *see, e.g.*, TAC ¶ 118, do not sufficiently demonstrate that Meta
 2 misappropriated Plaintiff's likeness *to its advantage or benefit*. As the Ninth Circuit explained in
 3 *Newcombe v. Adolf Coors Co.*—which addressed a similar situation—an advertisement that
 4 misappropriates somebody's likeness “could not be said to have directly benefited … the
 5 *publisher* of [the advertisement], because the benefit [the publisher] received—payment for the
 6 advertising space—was unrelated to the contents of the advertisement.” 157 F.3d 686, 693 (9th
 7 Cir. 1998) (emphasis added). Other courts have likewise dismissed claims in which the alleged
 8 benefit is generalized advertising revenue rather than a benefit specifically related to the illegality
 9 of the advertising content. *See, e.g.*, *Cross*, 14 Cal. App. 5th at 211 (dismissing misappropriation
 10 claim because “any ‘benefit’ to Facebook” from selling ad space near misappropriated content is
 11 ““unrelated to the content[]” itself) (quoting *Newcombe*, 157 F.3d at 693); *Perfect 10*, 2010 WL
 12 9479060, at *13 (declining to find Google liable for misappropriation claims when it derived
 13 advertising revenue from a third-party content provider’s displays of models’ likenesses on blog
 14 pages). Here, Plaintiff does not allege that the purported benefit Meta derived from the alleged
 15 misappropriation is connected to the alleged illegality of that content or distinct in any way from
 16 the purported benefit Meta derives from any other content made available on its platform.
 17 Accordingly, the claim must be dismissed.

18 **2. Negligence and negligent failure to warn.**

19 Plaintiff cannot state either of his negligence-based claims against the Meta because he
 20 does not and cannot allege that Meta owes him a cognizable duty of care. It is Plaintiff’s burden
 21 to plead facts establishing the existence of a duty. *See Tuttle v. Chase Ins. Life & Annuity Co.*,
 22 2007 WL 2790359, at *3-4 (N.D. Cal. Sept. 20, 2007). Plaintiff has failed to do so here.

23 As for negligence, Plaintiff claims that Meta owes a “duty to the public, including Dr.
 24 Forrest, to design and operate its advertising business in a commercially reasonable manner.”
 25 TAC ¶ 234. But Meta does not owe a duty to users—including Dr. Forrest—to control the
 26 actions of alleged third-party scam advertisers. And while Plaintiff claims Meta breached this
 27 duty by “acting as an advertising agency for the Scam Advertisers, knowingly producing Scam
 28 Ads,” as described above, *third parties* “produced” the alleged Scam Ads, not Meta. Plaintiff’s

1 own allegations show—at base—that he seeks to hold Meta liable for *third-party users* having
 2 posted those ads on Facebook.

3 Indeed, as a general rule, an “actor is under no duty to control the conduct of third
 4 parties.” *Melton v. Boustred*, 183 Cal. App. 4th 521, 535 (2010); *see e.g., Doe No. 1 v. Uber*
 5 *Technologies, Inc.*, No. 310131, 2022 WL 1769112 (N.D. Cal. June 1, 2022) (holding Uber did
 6 not have a duty to protect plaintiffs from third-party conduct where there was no special
 7 relationship to protect from third-party harm). While there are some common-law exceptions to
 8 this general rule, none applies here. For example, while courts have recognized a special
 9 relationship between innkeepers and guests, common carriers and passengers, and medical
 10 professionals and patients, *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 235, 236 n.14 (2005),
 11 they have consistently rejected attempts to fashion a “special relationship” between websites and
 12 their users. *See Dyroff*, 934 F.3d at 1101 (“No website could function if a duty of care was
 13 created when a website facilitates communication, in a content-neutral fashion, of its users’
 14 content.”); *Jackson v. Airbnb, Inc.*, 654 F.Supp.3d 990, 995 (C.D. Cal. 2023) (finding no special
 15 relationship where defendant could only remove listings and revoke membership, not control the
 16 property at issue); *Beckman v. Match.com, LLC*, 743 F. App’x 142, 143 (9th Cir. 2018) (affirming
 17 dismissal of negligence-based claim because plaintiff “failed sufficiently to allege a special
 18 relationship between her and [online dating website]”); *In re Zoom Video Commc’ns Inc. Priv.*
 19 *Litig.*, 525 F. Supp. 3d 1017, 1039 (N.D. Cal. 2021) (declining to find a “special relationship”
 20 between users and software platform); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1359
 21 (D.C. Cir. 2014) (no special relationship between Facebook and its users); *Bibicheff v. PayPal,*
 22 *Inc.*, 844 F. App’x 394, 395-96 (2d Cir. 2021) (affirming dismissal of negligence-based claim
 23 because PayPal did not have a special relationship with its users). Even more specifically, internet
 24 service providers do not have a duty to prevent users from publishing or consuming objectionable
 25 content. *See, e.g., Herrick*, 306 F.Supp.3d at 585-87, 599 (social networking application did not
 26 have a duty to prevent publication of allegedly dangerous and harassing content).

27 Plaintiff’s negligent failure to warn claim fails for the same reason. As the San Mateo
 28 Superior Court previously recognized, and as explained above, this claim fails at the first prong

“because a duty to warn does not exist absent a special relationship between Facebook **and the plaintiff**.” Order, Ex. B at 6; *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 435 (1976) (“[A]s a general rule, one … owe[s] no duty to control the conduct of another, nor to warn those endangered by such conduct,” absent a defendant’s “special relationship to either the person whose conduct needs to be controlled” or “to the foreseeable victim of that conduct.” (internal citations omitted)).

Here, Plaintiff alleges that a duty to Dr. Forrest exists absent any “special relationship” because Facebook’s ad targeting conduct constitutes “misfeasance” rather than nonfeasance. TAC ¶ 251. But, as the state court already observed, the alleged misfeasance is merely acts within Meta’s editorial discretion. Order, Ex. B at 6. And the Ninth Circuit’s decision in *Dyroff* made clear that characterizing a site’s promotion of allegedly harmful content as “misfeasance” rather than “nonfeasance” is a “misguided premise.” *Dyroff*, 934 F.3d at 1095, 1100. Because Meta has no duty to protect users from third-party content on its platform, Plaintiff cannot state a negligence claim.⁶

Accordingly, because Plaintiff cannot allege that Meta owed him a cognizable duty of care, his negligence and negligent failure to warn claims both fail.

3. Unjust enrichment.

When a plaintiff alleges unjust enrichment, California courts generally “construe the cause of action as a quasi-contract claim seeking restitution.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (citation omitted) (noting that “there is not a standalone cause of action for ‘unjust enrichment’”). The elements of a quasi-contract claim—which are identical to unjust enrichment—are: (1) receipt of a benefit; and (2) the unjust retention of the benefit at the expense of another. *Peterson v. Cellco P’ship*, 164 Cal. App. 4th 1583, 1593 (2008). Crucially,

⁶Confoundingly, Plaintiff claims that Meta owed a duty to the Australian public to warn about the scam ads, but also argues that any purported “special relationship” in negligence (to the extent there is one) is **between Meta and Dr. Forrest**, as Meta allegedly suggested Dr. Forrest create a verified Facebook page in 2014. TAC ¶ 252. Plaintiff has not and cannot establish that Meta’s purported suggestion gives rise to a “special relationship” under California law, as special relationships of this nature are rare and limited to, for example, common carriers and their passengers. *Delgado*, 36 Cal. 4th 224 at 235; *Dyroff*, 934 F.3d at 1101. And as discussed above, Meta does not owe any negligence duty to all Facebook users, including Dr. Forrest.

1 the benefit received by the defendant must be “obtained … *directly* from [the plaintiff].”

2 *Roadrunner Intermodal Servs., LLC v. T.G.S. Transp., Inc.*, 2021 WL 2188138, at *14 (E.D. May
3 28, Cal. 2021).

4 The TAC does not properly plead either element. Tellingly, Plaintiff never alleges that he
5 conveyed any benefit to Meta, let alone that Meta retained the benefit at Plaintiff’s expense.
6 Instead, Plaintiff alleges that Meta “wrongly received ad revenue in return for producing Scam
7 Ads” produced by “criminals” that “misused Dr. Forrest’s reputation, name, likeness, and
8 endorsement.” TAC ¶¶ 255-56. This is not enough. Plaintiff has not identified a benefit that
9 Meta received “*directly* from [Plaintiff],” and thus his “unjust enrichment claim [cannot be saved]
10 as a quasi-contract claim.” *Roadrunner*, 2021 WL 2188138, *14 (emphasis added) (holding that
11 an allegation that the defendant received “increased profits flowing from business with [a third
12 party]” did not sufficiently plead a direct benefit).

13 What is more, even if the claim were properly pleaded, it would still be independently
14 barred because Plaintiff also brought tort claims predicated on the same underlying facts. Unjust
15 enrichment is appropriate only “where the defendant obtained a benefit from the plaintiff [and]
16 the plaintiff has chosen not to sue in tort.” *Brown v. Wells Fargo Bank, N.A.*, No. 19-CV-260,
17 2019 WL 3318551, at *8 (E.D. Cal. July 24, 2019). In a case with parallel tort claims, an unjust
18 enrichment claim merges with—and is duplicative of—the tort claims. For that reason, too, the
19 unjust enrichment claim should be dismissed.

20 **4. Declaratory Relief.**

21 Plaintiff also asks that the Court “estop[] and otherwise equitably preclude[]” Meta from
22 relying on Section 230 as a defense here. TAC ¶ 260. This endeavor fails. Contrary to the
23 unsupported assertions in its TAC, Plaintiff has not demonstrated the requisite “substantial
24 controversy” entitling him to a declaratory judgment because, as explained above, *supra* Section
25 IV.A, Meta can rely on Section 230 to bar Plaintiff’s claims. *See Kimball v. Flagstar Bank*
26 *F.S.B.*, 881 F. Supp. 2d 1209, 1219-20 (S.D. Cal. 2012) (“[B]ecause the other causes of action fail
27 to state a claim, Plaintiffs have not demonstrated the requisite ‘substantial controversy’ for
28 declaratory judgment.”). Moreover, such relief is unnecessary, as it is duplicate of the relief

already sought by Plaintiff in his TAC. The Court can determine as a matter of law whether Section 230 applies here. *Lloyd v. Facebook, Inc.*, 2022 WL 4913347 (N.D. Cal. Oct. 3, 2022) (claims barred “as a matter of law under Section 230”). It does not also need to preclude Meta from relying on the defense. *Achal v. Gate Gourmet, Inc.*, 114 F.Supp.3d 781, 819 (N.D. Cal. July 14, 2015) (dismissing prayer for declaratory relief where the declaratory relief sought was “commensurate with the relief sought through [plaintiff’s] substantive claims.”).

D. Plaintiff Should Not Be Granted Leave to Amend.

Leave to amend is generally inappropriate if an amendment would be futile or if the plaintiff has already been permitted to amend the complaint. *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008). Both rationales support denying leave here.

Leave to amend is also inappropriate because Plaintiff’s “pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (citation omitted). Plaintiff’s claims seek to hold Meta liable for its actions as a publisher, so they will be barred by Section 230(c)(1) no matter what additional facts he pleads. That is why courts generally deny leave to amend when “there is CDA immunity.” *King v. Facebook, Inc.*, No. 21-CV-4573, 2021 WL 5279823, at *13 (N.D. Cal. Nov. 12, 2021) (dismissing claims barred by Section 230 with prejudice because “it would be futile for [Plaintiff] to try to amend the claim[s]”); *Brittain v. Twitter, Inc.*, No. 19-CV-114, 2019 WL 2423375, at *4 (N.D. Cal. June 10, 2019) (dismissing claims barred by Section 230 with prejudice “[b]ecause plaintiff cannot cure this defect”). Moreover, as established above (*see supra* § B), each of Plaintiff’s claims suffer other fatal deficiencies that he cannot overcome with further amendments.

The Court’s discretion to dismiss a claim without leave to amend is particularly broad where the plaintiff has previously filed an amended complaint, *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004), and Plaintiff has already amended his complaint three times: once by right in November 2021, and again in June 2022 after the San Mateo Superior Court dismissed the claims on multiple grounds, but nonetheless “granted leave … to file and serve a Second Amended Complaint, and once again after Meta agreed that Plaintiff could file his Third Amended Complaint. Plaintiff has therefore had ample opportunity to craft a valid pleading.

1 Even if amendment was not futile (and it is), there is no reason to give Plaintiff yet another
2 opportunity to replead.

3 **V. CONCLUSION**

4 For the foregoing reasons, Meta respectfully requests that the Court dismiss Plaintiff's
5 TAC in its entirety with prejudice.

6 Dated: January 19, 2024

7 ORRICK, HERRINGTON & SUTCLIFFE LLP

8 By: Jacob M. Heath
9 Jacob M. Heath

10 Attorney for Defendant
11 META PLATFORMS, INC.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28